

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ARTHUR L. AND RITA BURZYNSKI	:	DETERMINATION
	:	DTA NO. 816300
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
for the Year 1985.	:	

Petitioners, Arthur L. and Rita Burzynski, 1000 Renaud Drive, Lot # 51, Scott, Louisiana 70583-9122, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1985.

The Division of Taxation, by its representative, Steven U. Teitelbaum, Esq. (Herbert M. Friedman, Jr., Esq., of counsel), brought a motion dated June 18, 1998 seeking summary determination in the above-referenced matter pursuant to sections 3000.5 and 3000.9(b) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioners responded to the Division of Taxation's motion on July 10, 1998, which date began the 90-day period for the issuance of this determination. Based upon the motion papers, the affidavits and documents submitted therewith, and all pleadings and documents submitted in connection with this matter, Timothy J. Alston, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly denied petitioners' claim for refund of taxes paid on Federal pension income as untimely pursuant to the three-year statute of limitations period of Tax Law § 687(a).

FINDINGS OF FACT

1. Petitioners, Arthur L. and Rita Burzynski, filed a timely joint New York State personal income tax return for the year 1985. That is, petitioners filed their 1985 return on or before April 15, 1986. Petitioners reported and paid tax on Federal pension income paid to Arthur L. Burzynski on their return.

2. On or about November 14, 1994, petitioners filed a claim for refund of tax paid on Mr. Burzynski's Federal pension income for 1985. Petitioners did not file any refund claim for 1985 before November 14, 1994.

3. The Division of Taxation ("Division") subsequently denied petitioners' refund claim as untimely filed.

4. The facts set forth in Findings of Fact "1" through "3" were established through the affidavit of Charles Bellamy, submitted as part of the Division's motion papers. Mr. Bellamy is employed by the Division as a Tax Technician II. His duties include the review and processing of refund claims made by Federal pension recipients who were taxed on their income prior to 1989. In the performance of such duties, Mr. Bellamy reviewed the file for petitioners and their refund claim for 1985.

5. In support of their position petitioners submitted copies of two letters. Only a part of each of the letters has been submitted; the rest has been redacted. One of the letters is dated February 13, 1998 and is addressed to Arthur L. Burzynski. This letter expresses an opinion regarding the process of requiring Federal retirees to individually claim refunds and the

likelihood of success of those claims. Although written on the letterhead of a Milwaukee, Wisconsin law firm, the portion of the letter submitted does not indicate who wrote it. The second letter submitted is dated December 20, 1996 and is addressed to a Col. Paul W. Arcari, USAF (Ret.), of the Retired Officers Association. This letter states that New York has denied most refund claims for the year 1985 and states that the three-year statute of limitations has been the basis for such denials. The letter also comments that the State has ignored the advice it gave retirees in early April 1989, which was “that no refund claim need be filed because, if *Davis* [*Davis v. Michigan Dept. of Treasury*, 489 US 803, 103 L Ed 2d 891] were determined to be retroactive, all Federal retirees would receive refunds.” Like the other letter submitted, this letter was written on the letterhead of the Milwaukee law firm, but does not indicate its author.

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted:

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

B. Here, petitioners did not contest the facts alleged in the Bellamy affidavit, i.e., that petitioners timely filed their 1985 return and did not file a refund claim within three years of the date of such filing. Consequently, those facts may be deemed admitted (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Whelan By Whelan v. GTE Sylvania*, 182 AD2d 446, 582 NYS2d 170, 173; *Matter of Jones*, Tax Appeals Tribunal, January 9, 1997). Accordingly, there are no material and triable issues of fact presented, and, as a matter of law, a determination may be issued in this matter.

C. The Tax Appeals Tribunal has consistently denied claims for refunds of personal income tax paid on Federal pension income where, as here, such claims were not filed within the three-year statute of limitations set forth in Tax Law § 687(a) (*see, e.g., Matter of Purvin*, Tax Appeals Tribunal, October 9, 1997; *Matter of Nuzzi*, Tax Appeals Tribunal, October 2, 1997; *Matter of Hotaling*, Tax Appeals Tribunal, June 19, 1997; *Matter of Burkhardt*, Tax Appeals Tribunal, January 9, 1997; *Matter of Jones, supra*). The basis for the Tribunal's conclusion in these cases has been that the backward-looking relief afforded by the three-year limitations period of section 687(a) is sufficiently "meaningful" under the rule of *Harper v. Virginia Dept. of Taxation* (509 US 86, 125 L Ed 2d 74, 89, citing *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 US 18, 110 L Ed 2d 17) to remedy the unconstitutional deprivation caused by the discriminatory treatment of Federal pensions prior to the enactment of Tax Law § 612(c)(3)(ii) (*see*, L 1989, ch 664). In other words, the Tribunal has held that, in this context, Tax Law § 687(a) satisfies the demands of Federal due process.

The identity of facts between this case and the cited Tribunal cases compels an identical conclusion; that is, that petitioners' claim for refund for the year at issue was untimely filed.

D. The two letters submitted by petitioners lend little support to their position. Neither letter addresses the legal issue presented in this matter. Furthermore, while the December 20, 1996 letter contains a statement that the Division gave erroneous advice to taxpayers in early April 1989, there is no claim in the record that petitioners were given erroneous advice. Moreover, the statement is unsworn and the identity of the person making it is unknown. It is therefore of little evidentiary value.

E. The petition of Arthur L. and Rita Burzynski is denied.

DATED: Troy, New York

August 20, 1998

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE